

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

**SUPREME JUDICIAL COURT
No.**

**APPEALS COURT
NO. 2016-P-1277**

COMMONWEALTH

v.

KEVIN A. MAURICIO

APPLICATION FOR DIRECT APPELLATE REVIEW

Now comes the defendant/appellant, Kevin A. Mauricio, in the above-entitled matter and applies, pursuant to Mass. R. App. P. 11, for direct appellate review of the trial court's denial of his Motion to Suppress Physical evidence. The grounds for this application are set forth in the accompanying memorandum of law.

Respectfully submitted,
Kevin A. Mauricio
By his attorney,

/s/ Mathew Zindroski

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Dated: 12/2/16

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPREME JUDICIAL COURT
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COMMONWEALTH

v.

KEVIN A. MAURICIO

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
APPLICATION FOR DIRECT APPELLATE REVIEW

Now comes the defendant/appellant, Kevin A. Mauricio, in the above-entitled matter and applies, pursuant to Mass. R. App. P. 11, for direct appellate review. For the reasons set forth herein, this application should be allowed.

STATEMENT OF PRIOR PROCEEDINGS

Complaint No. 1431 CR 1743 alleges that the defendant/appellant, Kevin A. Mauricio, committed the following three offenses: (Count 1) carrying a firearm without a license in violation of M.G.L. c.269, s.10(a); (Count 2) possession of ammunition without FID card in violation of M.G.L. c.269, s.10(h)(1); and (Count 3) receiving stolen property in excess of \$250

in violation of M.G.L. c.266, s.60. (R.A. 1).¹ Mr. Mauricio pled not guilty to all counts. (R.A. 4). On September 14, 2014, he moved to suppress evidence seized from the search of his backpack and digital camera. (R.A. 12). On December 29, 2014, Judge Thomas L. Finigan allowed the motion after he conducted an evidentiary hearing on December 15, 2014. (R.A. 15). The Commonwealth filed a motion to reconsider and, after a hearing on February 18, 2015, Judge Finigan allowed the Commonwealth's motion. (R.A. 20). On April 28, 2015, Judge Finigan conducted a second evidentiary hearing, which focused on the search of the digital camera contained in the backpack. (R.A. 23). Judge Finigan denied Mr. Mauricio's motion to suppress the photographs seized by the police from the digital camera on April 30, 2015. (Id.).

A two-day jury trial commenced on September 9, 2015 before Judge Finigan in the Taunton District

¹ The Record Appendix is filed in the Appeals Court and cited by page as "(R.A. ____)." The transcripts of Mr. Mauricio's motions to suppress and jury trial consist of seven volumes and are cited by volume and page as "(Tr. /)." The addendum is also filed in the Appeal Court and is cited by page as "(Add.)." The docket entries related to this case are reproduced post.

Court. (R.A. 9). The jury found Mr. Mauricio guilty of possessing a firearm and receiving stolen property but not guilty of possessing ammunition. (R.A. 4). The trial court sentenced him to two and a half years in the house of correction on Count 1 for carrying a firearm without a license. (Id.). Additionally, he was sentenced to three years of supervised probation on and after this period of incarceration on Count 3, which alleged receiving stolen property. (Id.). Mr. Mauricio filed a timely notice of appeal and this case entered in this Court on September 20, 2016 and was docketed as No. 2016-P-1277. (R.A. 27). On November 23, 2016, Mr. Mauricio filed his Brief and Record Appendix. The case has not yet been heard by the Appeals Court.

STATEMENT OF THE FACTS

Arrest and Search of Mr. Mauricio

On May 28, 2014, Officer Brett Collins responded to a call related to a suspicious person "in the area of Downing Drive." (Tr. VI/96). Upon arrival, a neighbor reported that a male in a "blue or black hooded sweatshirt" with a backpack and red gloves and female wearing a gray sweatshirt were running out of the side door at 24 Downing Drive. (Id.). Nearby,

Officer Collins located these individuals and identified the male as Mr. Mauricio at trial. (Tr. VI/97). Officer Collins pat frisked Mr. Mauricio, opened his backpack and discovered drugs, needles, jewelry and various electronic devices, including a digital camera. (Tr. VI/99-100).

Officer Collins detained Mr. Mauricio "for investigatory purposes" and brought him back to Downing Drive where the homeowner confirmed a break-in at his home. (Tr. I/11-12). Officer Collins performed a show up and the neighbor identified Mr. Mauricio, who was placed under arrest. (Tr. I/12).

Search of Mr. Mauricio's Digital Camera

Detective Dora Treacy worked in the evidence room at the police station at the time of Mr. Mauricio's arrest. (Tr. IV/4-5). She inventoried the contents of his backpack and testified that she handled a digital camera "to enter it into evidence." (Tr. IV/5-6). Specifically, regarding her examination of the digital camera, she testified:

I just happened to - I just said let me see if I can - if I recognize anybody to identify the ownership, try to identify the owner. And I just turned it on and then looked through the pictures to see... if I recognized anyone.

(Tr. IV/6). She testified that, although she didn't know how many photographs were stored on the camera, "there were quite a few." (Tr. IV/7). After looking through the photographs, she eventually "saw a picture with somebody with guns and ammunition." (Id.). Det. Treacy testified that the camera did not have any "wireless" network capabilities. (Id.).

Det. Treacy provided the camera to Detective Michael Bonenfant for further investigation. (Tr. IV/8). He examined the camera and its stored photographs. (Tr. IV/13-14). He "thought that the firearms in the photograph may have been the exact same firearms that were taken from" an earlier housebreak at 107 Plain Street in Taunton. (Tr. IV/14). Det. Bonenfant examined the camera and observed a "SIM card" in the camera. (Tr. IV/21). At the time of trial, no one had claimed ownership of the camera. (Tr. IV/10).

Stolen Property

Earlier, on May 12, 2014, Det. Bonenfant responded to the "housebreak" at 107 Plain Street. (Tr. VI/56). He spoke with the homeowners, Brian and Amy Silva, who reported that two firearms and jewelry were stolen. (Tr. VI/61). Det. Bonenfant brought Mr.

Silva to the station to identify the firearms in the photographs. (Tr. VII/59-61). Mr. Silva identified the pictured firearms as his missing "Beretta .22 caliber" and nine millimeter "Firestar." (Tr. VII/54-55). Mr. Silva specifically identified the Firestar by the "insignia on the rubber grip." (Tr. VII/64). Mr. Silva testified that the .22 caliber "was worth around \$350," and the Firestar was worth "probably around \$500." (Tr. VII/57). Additionally, Ms. Silva testified that a "Tiffany... mesh ring" was stolen. (Tr. VII/46). She identified a photograph of the ring at trial. (Tr. VII/48-49).

Trial Court's Suppression Findings

The issue on appeal is the suppression of the photographs seized from the search of the digital camera's data. This was the subject of Judge Finigan's decision, dated April 28, 2018. The findings are as follows:

The findings of fact from the Court's decision dated December 29, 2014 are incorporated herein, with the following additional facts based on credible evidence presented at the hearing:

Following the defendant's arrest, Detective Dora Treacy² of the Taunton Police Department

² While the judge's findings of fact refer to "Detective Dora Tracy," her name is correctly spelled

was tasked with logging the items contained in the backpack into the Taunton Police Department computer before placing the items into the evidence room. Treacy, a longtime police officer, had been assigned as the Department's evidence officer for a period of approximately 2 ½ years. Based on her discussions with the arresting officer, Detective Treacy believed the items contained in the backpack, which included jewelry, foreign money and a digital camera, were stolen. In an effort to attempt to locate the true owner of the camera, Detective Treacy powered on the digital camera and examined images stored in the camera in hopes of seeing a face she would be able to identify. The camera had a SIM card for image storage, but was not otherwise equipped to connect to the internet or a remote sever, etc. Treacy was unable to determine the true owner of the camera by inspection of the images, but she did notice a photograph of a man with firearms. Treacy knew that a fellow detective, Detective Michael Bonenfant³, had been investigating a recent theft of firearms in the city of Taunton. Treacy traveled from her basement office upstairs to where she found Detective Bonenfant and showed him the image of the man with the firearms.

Detective Bonenfant had in fact been investigating a recent housebreak on Plain Street in Taunton, where two firearms, jewelry and other items had been taken. Bonenfant had a description of the firearms, and believe that the firearms shown in the image matched the stolen weapons. Bonenfant

"Treacy." (Tr. VII/20). The spelling of her name has been corrected in the judge's findings for consistency and clarity.

³ Similarly, the findings of fact refer to "Det Bonefant," while his name is correctly spelled "Bonenfant." (Tr. V/54). The spelling of his name has been corrected in the judge's findings.

contacted the homeowner, one Brian Silva, and showed him a photo of the firearms. Based on the image of the firearms, together with other items in the photo which Silva recognized as stolen from his home, including fireworks, knives and ammunition, Silva identified the firearms as the pair taken during the break. The defendant as identified as the individual show in the photograph. Neither Detective Treacy nor Detective Bonenfant were able to identify in the true owner of the camera, which may or may not have been owned by the defendant.

(R.A. 23-24).

The above findings reference and adopt the findings from the December 29, 2014 suppression decision, which are as follows:

[O]n May 28, 2014, Officer Brett Collins of the Taunton Police Department, and eleven year police officer veteran, received a radio transmission from his dispatcher concerning a report of suspicious parties in the area of 24 Downing drive in Taunton. Collins proceeded to that address and was flagged down by a resident of 34 Downing Drive, the home adjacent to 24 Downing Drive. According to the homeowner, he had observed a man wearing red gloves run out of the side door of his neighbor's house and joint a female outside. The pair then ran towards Tremont Street and out of view.

According to the witness, the man was wearing a blue or black hooded sweatshirt and carrying a backpack while the female was wearing a grey sweatshirt. Collins radioed that description to his fellow officers and proceeded in the direction the pair were last seen.

Within moments, Collins encountered a man and woman on nearby Davis street matching

the description provided by the neighbor, with the exception that the man was not wearing gloves. Collins stopped his cruiser and spoke to the pair, asking them where they coming from. The man, later identified as the defendant, responded by indicating he had been visiting a friend up the road, but did not know the name of the street. For his own safety, Officer Collins frisked the defendant, finding no weapons. Meanwhile, a second officer arrived at the scene and patfrisked the female.

When first approached by Collins, the defendant was carrying a backpack. Officer Collins asked the defendant whether there might be any needles or other dangerous items in the backpack. The defendant indicated that in fact the backpack did contain needles. Officer Collins proceeded to search the backpack and located what he believed to be prescription pills including Percocet and oxycodone, needles, various electronic items, coins and jewelry. Officer placed the defendant in his cruiser and returned to Downing Drive.

Upon arriving at Downing Drive, Collins learned that the owner of 24 Downing Drive had returned and confirmed a break had taken place at her home. While Collins was inside the home, he learned that his supervising sergeant had conducted a show up identification with the reporting neighbor, who indicated that in fact the defendant was the person he had seen run from the side door of 24 Downing Drive. The defendant was placed under arrest for illegal possession of narcotics as well as the breaking and entering in transported to the station for booking. While at the booking, the defendant was giving his Miranda warnings and the full contents of the backpack were inventoried. The red gloves described by the homeowner were found in the defendant's pocket.

(R.A. 15-17).

STATEMENT OF ISSUES
RAISED ON DIRECT APPEAL

On direct appeal, Mr. Mauricio briefed the following two issues pertaining to the trial court's denial of Mr. Mauricio's Motion to Suppress Physical Evidence.

- I. Whether the photographs seized by the police during a warrantless search of Mr. Mauricio's digital camera should have been suppressed where the search was made after the camera was secured in police custody, it was not grounded in probable cause, an inventory policy or a safety concern and it violated his expectation of privacy concerning its stored data.
- II. If this Court orders only that the photographs and the firearms depicted therein should be suppressed, should Mr. Mauricio's conviction for receiving stolen property with a value greater than \$250 be reversed because the Commonwealth presented insufficient evidence to prove, as a matter of law, the value or condition of any other property.

While these arguments are each properly preserved by the filing of a timely notice of appeal, and briefed for full appellate review, as discussed supra, this application focuses principally upon Argument I as grounds for direct appellate review.

ARGUMENT

THE SEIZURE OF PHOTOGRAPHS FROM MR. MAURICIO'S DIGITAL CAMERA DURING THE POLICE'S WARRANTLESS SEARCH WAS UNCONSTITUTIONAL AND REQUIRES SUPPRESSION AND VACATUR OF HIS CONVICTIONS BECAUSE THE SEARCH WAS CONDUCTED AFTER THE CAMERA WAS SECURED IN CUSTODY, IT WAS NOT GROUNDED IN PROBABLE CAUSE, AN INVENTORY POLICY OR A SAFETY CONCERN AND IT VIOLATED HIS EXPECTATION OF PRIVACY RELATED TO STORED DATA.

The trial court erred when it denied Mr. Mauricio's motion to suppress evidence recovered from Det. Treacy's warrantless search of his digital camera because it was impermissible as a search incident to a lawful arrest and there were no other exigent circumstances to warrant the intrusion. See Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights. Evidence recovered through a warrantless search of an electronic device made incident to an arrest has been held inadmissible in Riley v. California, 573 U.S. 1 (2014), a case consistent with existing Massachusetts law. See Commonwealth v. Dyette, 87 Mass. App. Ct. 548, 557 (2015).

- A. MR. MAURICIO HAS A PRIVACY INTEREST IN THE DATA STORED ON HIS DIGITAL CAMERA THAT IS SIMILAR TO THE PRIVACY INTEREST THAT THE SUPREME COURT FOUND IN CELLULAR PHONE DATA BECAUSE BOTH DEVICES HAVE MASSIVE STORES OF DIGITAL INFORMATION THAT IS NOT READILY APPARENT FROM AN EXTERNAL, PHYSICAL EXAMINATION OF THE DEVICE.

The search of Mr. Mauricio's digital camera violated his right to privacy in its stored information under the Fourth and Fourteenth Amendments to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights. This Court should extend the warrant and probable cause requirements to information stored on his digital camera where they have already been held applicable to data stored on cellular phones. See Dyette, 87 Mass. App. Ct. at 557. As such, the suppression of evidence seized from Mr. Mauricio's digital camera is warranted along with the vacatur and reversal of his convictions.

Riley extends constitutional protection to stored electronic data like that at issue in the instant case. See Riley, 573 U.S. at 10. There, the police stopped the defendant for a motor vehicle violation and arrested him for unlawfully possessing firearms. Id. at 2. Upon arrest, they seized a cellular phone from his pocket and, at the station, searched its stored data without a warrant or his consent. Id. They discovered evidence of gang membership and photographs of him "standing in front of a car they

suspected had been involved in a shooting.” Id. He challenged the admissibility of the evidence recovered from his phone on the grounds that its search “violated the Fourth Amendment, because they had been performed without a warrant[.]” Id. at 3. The Supreme Court held that the “search incident to arrest” exception does not apply to cellular phones and that officers “must generally secure a warrant” before searching “data on cell phones.” Riley, 573 U.S. at 10. It noted that the search was neither necessary for officer safety nor the prevention of the destruction of evidence. Id. at 10-15.

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. [...] In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.

Id. at 6-7; quoting Chimel, 395 U.S. at 762-763.

Applying these two factors, The Supreme Court found that police can “examine the physical aspects of a phone to ensure that it will not be used as a weapon,” and that once any physical threats have been eliminated, “data on the phone can endanger no one.”

Riley, 573 U.S. at 10-11. Furthermore, after an individual is arrested, "there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone" where officers can prevent remote wiping of data by turning the phone off or placing it in a faraday bag. Id. at 12, 14. The Riley court declined to extend the holding in U.S. v. Robinson, 414 U.S. 218 (1973), to data stored on cellular phones because the search of a cellular phone implicates a greater privacy interest than the "brief physical search" of a "package of cigarettes." Riley, 573 U.S. at 10.

This Court adopted Riley's holding in Dyette, where the defendant was arrested for trespassing and the police discovered a "flip phone" in his possession. Dyette, 87 Mass. App. Ct. at 550, n. 3. The defendant and the phone were transported to the police station where the booking officer examined the phone without a warrant, probable cause or consent. Id. at 551. The officer discovered evidence in the cellular phone's call log that "showed that the defendant was not talking with his girlfriend as he had claimed." Id. This Court applied Riley and held that the search of the phone required a warrant. Id.

at 763. This Court noted that the "digital contents of cell phones 'place vast quantities of personal information' in the hands of the police," and held that the warrantless search violated the Fourth Amendment to the United States Constitution. Dyette, 87 Mass. App. Ct. at 558-59; quoting Riley, 573 U.S. at 9.

The search of Mr. Mauricio's digital camera is on all fours with the search of the cellular phones described in Riley and Dyette. See Riley 573 U.S. at 1-2; Dyette, 87 Mass. App. Ct. at 558-59. Similarly, the search of the Mr. Mauricio's camera occurred after his arrest at the police station, (R.A. 23-24). Compare Riley, 573 U.S. at 2; Dyette, 87 Mass. App. Ct. at 551. Like a cellular phone, the digital camera presented no potential danger to Det. Treacy after physical inspection, (R.A. 24). Compare Riley, 573 U.S. at 10; Dyette, 87 Mass. App. Ct. at 563 n. 13. In addition, Mr. Mauricio's digital camera, which lacked wireless networking capabilities, presented no danger of remote destruction of evidence. (R.A. 24). Likewise, there were no exigent circumstances present for Mr. Mauricio's digital camera as illustrated by Det. Treacy's testimony that her purpose in searching

the phone was to "see if I can - if I recognize anybody to identify the ownership, try to identify the owner." (Tr. IV/6).

Although Riley and Dyette directly apply to cellular phones, a prohibition for warrantless searches of data stored on a digital camera is consistent given the nature of the information stored and the privacy interest requiring its protection. See Riley, 573 U.S. at 10. The Supreme Judicial Court recently noted that "data could be found anywhere within an electronic device" in examining the scope of a search warrant in the "virtual world[.]" Commonwealth v. Dorelas, 473 Mass. 496, 502 (2016). Given the breath of modern electronic devices that now store personal, private information, this Court should find that the privacy interests raised by a warrantless search of a digital camera incident to an arrest are the same as those raised by a similar search of a cellular phone. See Riley, 573 U.S. at 18. Specifically, Riley compels this holding where the Supreme Court described the privacy interests in the electronically stored information as follows:

The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations,

and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet.

Id. Based on the foregoing rationale, it noted that a "cell phone's capacity allows even just one type of information to convey far more than previously possible." Id. Specifically, the Riley court found that a cellular phone can hold "thousands of photographs," and that "the data on a phone can date back to the purchase of the phone, or even earlier." Id. Thus, "[a]llowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case." Id. at 19. In the instant case, Mr. Mauricio's digital camera allowed him to carry the digital equivalent of "video tapes" and "photo albums" as discussed in Riley. Id. at 25. The extent of Mr. Mauricio's privacy interest in the digital camera is illustrated when Det. Treacy testified that she looked through "quite a few" photographs before discovering the photographs of the firearms. (Tr. IV/7).

Other jurisdictions have extended constitutional rights to searches indecent to arrest of data stored on digital cameras. In Schlossberg v. Solesbee, 844 F. Supp. 2d 1165, 1167 (D. Or. 2012), the police

searched the defendant's digital camera without a warrant after his arrest. The Schlossberg court found that "it is impractical to distinguish between electronic devices ... before an officer decides whether to proceed with a search of the electronic device incident to arrest" because "it would require officers to learn and memorize the capabilities of constantly changing electronic devices." Id. The Schlossberg court described that "the storage capability of an electronic device is not limited by physical size as a container is" and, thus, it held that "warrantless searches of [digital cameras] are not reasonable incident to valid arrest." Id. at 1169-70.

In U.S. v. Miller, 34 F. Supp. 3d 695, 697 (E.D. Mich. 2014), the police examined the defendant's digital camera by looking through the photographs stored on it while executing a search warrant for evidence of drug trafficking. The court distinguished these circumstances from those in Riley because this case involved a "warranted search of a home" and not a "warrantless search incident to arrest." Id. at 699. However, the court noted that "police would not be entitled to a warrantless search of his personal

camera absent some exigent need” because defendant had a “reasonable expectation of privacy” in the data stored on the digital camera. Id. at 699-700. Contrast U.S. v. Bah, 794 F.3d 617, 633 (6th Cir. 2015) (declining to extend similar protection to the magnetic strips of credit cards because of the strip’s limited storage capacity and that the data contained is the information already printed on the front of the card).

The Schlossberg case demonstrated the similar nature of electronic devices when the court held that it was “impractical to distinguish between electronic devices” because of the vast storage capacity of modern electronic devices. Schlossberg, 844 F. Supp. 2d at 1170. In the present case, Det. Treacy did not know the content and extent of the data stored on the digital camera prior to her search. (Tr. IV/7). Following therefrom and as held in Miller, 34 F. Supp. 3d at 699-700, this Court should extend the protections against warrantless searches to data stored on digital cameras because of the vast storage capacities of modern electronic devices. See Schlossberg, 844 F. Supp. 2d at 1170.

Accordingly, this Court should find that Mr. Mauricio has presented meritorious claims concerning the unconstitutional warrantless search of his digital camera and allow direct review.

STATEMENT OF REASONS WHY
DIRECT APPELLATE REVIEW IS APPROPRIATE

Direct appellate review is in the interests of the justice and wellbeing of the public because this Court has never addressed the warrantless search incident to arrest of modern electronic devices, other than cellular phones. See Dyette, 87 Mass. App. Ct. at 557. While this court has held such a search of a cellular phone unconstitutional, it has not addressed similar warrantless searches of other electronic devices, such as digital cameras. Id. This issue greatly concerns the public interest because of the pervasiveness of data stored on electronic devices. See Commonwealth v. Dorelas, 473 Mass 496, 502 (2016). Other electronic devices present the same privacy concerns as cellular telephones because of their large storage capacity. See Schlossberg, 844 F. Supp. 2d at 1170. Where other jurisdictions have firmly decided this issue in favor of the defendant, this Court's

guidance would benefit the fair administration of justice.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Honorable Court should allow the defendant's application for direct appellate review.

Respectfully submitted,
Kevin A. Mauricio
By his attorney,

/s/ Mathew Zindroski

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Dated: 12/2/16

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KEVIN A. MAURICIO

EXHIBIT LIST

1. Certified Docket Entries
2. Decision on Defendant's Motion to Suppress
3. Decision on Defendant's Second Motion to Suppress

Exhibit 1

CRIMINAL DOCKET		DOCKET NUMBER 1431CR001743		NO. OF COUNTS 3		Trial Court of Massachusetts District Court Department		
DEFENDANT NAME AND ADDRESS Kevin A Mauricio Homeless Taunton, MA 02780			DOB 10/29/1981		GENDER Male		COURT NAME & ADDRESS Taunton District Court 40 Broadway Street Taunton, MA 02780	
			DATE COMPLAINT ISSUED 07/09/2014					
			PRECOMPLAINT ARREST DATE Warren					
INTERPRETER REQUIRED								
FIRST FIVE OFFENSE COUNTS								
COUNT	CODE	OFFENSE DESCRIPTION					OFFENSE DATE	
1	269/10/J	FIREARM, CARRY WITHOUT LICENSE c269 s.10(a)					05/12/2014	
2	269/10/TT	AMMUNITION WITHOUT FID CARD, POSSESS c269 §10(h)(1)					05/12/2014	
3	266/60/A	RECEIVE STOLEN PROPERTY +\$250 c266 §60					05/12/2014	
DEFENSE ATTORNEY Fyfe Brothers			OFFENSE CITY/TOWN Taunton			POLICE DEPARTMENT Taunton PD		
DATE & JUDGE		DOCKET ENTRY			DATE & JUDGE		FEES IMPOSED	
Finigan AUG 12 2014		<input type="checkbox"/> Attorney appointed (SJC R. 3:10) <input type="checkbox"/> Atty denied & Deft. Advised per 211 D §2A <input type="checkbox"/> Waiver of Counsel found after colloquy Terms of release set: <input type="checkbox"/> PR <input checked="" type="checkbox"/> Bail \$5000 <input type="checkbox"/> See Docket for special condition <input type="checkbox"/> Held (276 §58A)			AUG 12 2014		Counsel Fee (211D § 2A(12)) <input type="checkbox"/> WAIVED \$ 150/ea	
							Counsel Contribution (211D § 2) <input type="checkbox"/> WAIVED \$	
							Default Warrant Fee (276 § 30(1)) <input type="checkbox"/> WAIVED \$	
Pullen 8-15-14		Arraigned and advised: <input checked="" type="checkbox"/> Potential of bail revocation (276 §58) <input checked="" type="checkbox"/> Right to bail to review (276 §58) <input type="checkbox"/> Right to drug exam (111E § 10)					Default Warrant Arrest Fee (276 § 30(12)) <input type="checkbox"/> WAIVED \$	
							Probation Supervision Fee (276 § 87A) <input type="checkbox"/> WAIVED \$ 65	
							Bail Order Forfeited	
		Advised of right to jury trial <input type="checkbox"/> Waiver of jury found after colloquy <input type="checkbox"/> Does not waive			A TRUE COPY ATTEST CMAH CLERK-MAGISTRATE TAUNTON DIVISION			
		Advised of trial rights as pro se (Dist. Ct. Supp.R.4)						
		Advised of right of appeal to Appeals Ct. (M.R. Crim P.R. 28)						
SCHEDULING HISTORY								
NO.	SCHEDULED DATE	EVENT	RESULT			JUDGE	TAPE START/STOP	
1			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
2			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
3			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
4			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
5			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
6			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
7			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
8			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
9			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
10			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd					
APPROVED ABBREVIATIONS ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.								
A TRUE COPY ATTEST:		CLERK-MAGISTRATE / ASST CLERK X				TOTAL NO. OF PAGES		ON (DATE)



CRIMINAL DOCKET DOCKET ENTRIES		DEFENDANT NAME Kevin A Mauricio	DOCKET NUMBER 1431CR001743
DATE	DOCKET ENTRIES		
7-10-14	-WARRANT ISSUED		
7-22-14	warrant held w/o seizure		
8-4-14	warrant issued for 8-12-14		
	8-12-14 Arr (1)		
AUG 12 2014	Dong Huang Reg D held w/out		
	bail C 8-15-14 dangher (1) 8-15-14		
8-18-14	mitt issued		
8-15-14	Cw w/Drumz SGA Request - (1) B		
9-3-14	Phillips - Botten - ADA - Bail set		
	5,000 (1) / 50,000 (1) - Court 9-26-14		
	not (1) mitt to issue		
SEP 26 2014	Cont'd e Comm. Request (written not		
	properly subpoena) - over def's objection		
	10/3/14 - arr - (1) - Dangher - \$5,000 CASH		
	mitt to issue		
9-26-14	mitt issued		
OCT 31 2014	12/15/14 Motion (1) J. Finigan		
1-	Bail remains \$5,000 - CASH \$50,000, Security		
	Commox w/this Request mitt to issue		
DEC 15 2014	MOTION Hearing - (1) - 12:32 pm - J. Finigan		
	ADA Vivieros - A/c Brothers; witness #1		
	TAUNTON Police Officer Brett Collins @ 12:33 pm		
	MOTION taken under advisement - this is		
	PART 1 of MOTION - 1/16/14 - PART 2 MOTION -		
	(1) - J. Finigan same Bail - mitt to issue.		
12/15/14	mitt issued		
12-29-14	Decision filed on Defendant's Motion to Suppress, parties notified		

APPROVED ABBREVIATIONS

ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review
 SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate
 DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.



CRIMINAL DOCKET DOCKET ENTRIES		DEFENDANT NAME Kevin A Mauricio In This Case Known As Kevin A Mauricio	ATTEST CLERK-MAGISTRATE TAUNTON DIVISION	DOCKET NUMBER 1431CR001743
DATE	DOCKET ENTRIES			
JAN 16 2015	2/18/15 - MTN FOR RECONSIDERATION - (4) TO BE HEARD BY J. FINIGAN. ANY MEMOS TO BE SUBMITTED BY 2/6/15 - Bail reduced to \$500 by J. CANAAN - (without prejudice) MITT TO ISSUE			
1-16-15	mitt issued			
1-20-15	Motion for Reconsideration filed			
2-18-15	mt to reconsider filed w/ objections aft argument - order about bail of \$500 cash - Finigan C 3.12.15 PTH (3)			
2-18-15	mitt issued			
2-19-15	Comm's mt to reconsider - allowed Finigan all parties notified			
3-12-15	D's presence would today - Court 4-10-15 mt @ KJR - Brothers - Bureau Same Bail 500 @ / 5000 @ mitt to issue			
3-12-15	mitt issued			
4/10/15	2 ²² PM: (CONT) for mt to app b/f JUDGE FINIGAN - per J. OSTRACH - ct room - (2) - #30415 4/28/15 - Bail June - \$500 cash - mitt to issue - mitt issued			
APR 28 2015	MOTION HEARING - (1) - J. Finigan - 11 ⁴ AM - Jct DORA Tracy - 11 ²² AM - Jct Michael 830 PM A KATE - 11 ³² AM - Court Room @ 11 ⁴⁰ - Jct Room @ 11 ⁴⁰ AM - Motion under adjournment			

APPROVED ABBREVIATIONS

ARR = Arraignment PT = Pretrial hearing CE = Discovery compliance & jury selection T = Bench trial JT = Jury trial PC = Probable cause hearing M = Motion hearing SR = Status review
SRP = Status review of payments FA = First appearance in jury session S = Sentencing CW = Continuance without finding scheduled to terminate P = Probation scheduled to terminate
DFTA = Defendant failed to appear & was defaulted WAK = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PR = Probation revocation hearing



Exhibit 2

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

DISTRICT COURT DEPT.
TAUNTON DIVISION
1431CR1743

COMMONWEALTH

V.

KEVIN A. MAURICIO

DECISION ON DEFENDANT'S MOTION TO SUPPRESS

This Court conducted an evidentiary hearing on December 15, 2014 on the defendant's Motion to Suppress, seeking to suppress the contents of a backpack seized in Taunton on May 28, 2014. The Commonwealth presented the testimony of Taunton Police Officer Brett Collins. After full consideration of the evidence, the defendant's Motion is **ALLOWED**.

FINDINGS OF FACT

Based on the credible evidence presented, I find the following: on May 28, 2014, Officer Brett Collins of the Taunton Police Department, an eleven year police officer veteran, received a radio transmission from his dispatcher concerning a report of suspicious parties in the area of 24 Downing Drive in Taunton. Collins proceeded to that address and was flagged down by a resident of 34 Downing Drive, the home adjacent to 24 Downing Drive. According to the homeowner, he had observed a man wearing red gloves run out of the side door of his neighbor's house and join a female outside. The pair then ran towards Tremont Street and out of view.

According to the witness, the man was wearing a blue or black hooded sweatshirt and carrying a backpack while the female was wearing a gray sweatshirt. Collins radioed that description to his fellow officers and proceeded in the direction the pair were last seen.

Within moments, Collins encountered a man and woman on nearby Davis Street matching the description provided by the neighbor, with the exception that the man was not wearing gloves. Collins stopped his cruiser and spoke to the pair, asking them where they were coming from. The man, later identified as the defendant, responded by indicating he had been visiting a friend up the road, but did not know the name of the street. For his own safety, Officer Collins frisked the defendant, finding no weapons. Meanwhile, a second officer arrived at the scene and patfrisked the female.

When first approached by Collins, the defendant was carrying a backpack. Officer Collins asked the defendant whether there might be any needles or other dangerous items in the backpack. The defendant indicated that in fact the backpack did contain needles. Officer Collins proceeded to search the backpack and located what he believed to be prescription pills including Percocet and oxycodone, needles, various electronic items, coins and jewelry. Officer placed the defendant in his cruiser and returned to Downing Drive.

Upon arriving at Downing Drive, Collins learned that the owner of 24 Downing Drive had returned and confirmed a break had taken place at her home. While Collins was inside the home, he learned that his supervising sergeant had conducted a show up identification with the reporting neighbor, who indicated that in fact the defendant was the person he had seen run from the side door of 24 Downing Drive. The defendant was placed under arrest for illegal possession of narcotics as well as the breaking and entering in transported to the station for booking. While

at the booking, the defendant was given his Miranda warnings and the full contents of the backpack were inventoried. The red gloves described by the homeowner were found in the defendant's pocket.

The defendant was charged with Receiving Stolen Property with a value of greater than \$250.

RULINGS OF LAW

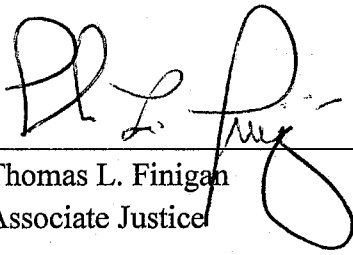
Initial Encounter. General Laws c. 41, §98 provides that a police officer may stop and question a person whom the officer has "reason to suspect of unlawful design." To be lawful, a stop must be based on a reasonable suspicion that the person detained has committed, is committing, or is about to commit a crime. Commonwealth v. Stoute, 422 Mass. 782 (1996). The officer must be able to point to specific and articulable facts, and any rational inference which may be drawn there from, which justify his or her suspicions. United States v. Cortez, 449 U.S. 411 (1981). The determination of reasonable suspicion is a two-pronged inquiry: "first, whether it was permissible to initiate investigation and second, whether the scope of the seizure was justified by the situation." Commonwealth v. Williams, 422 Mass. 111, 116 (1996). In this case, Officer Collins had an eyewitness account of a possible breaking and entering which included the uncommon sight of a man fleeing while wearing gloves, he had a particularized description of the perpetrators and he encountered the defendant in a public setting near the scene. His brief detention was justified under G.L. 41, §98 and the caselaw.

Search of Backpack. To determine whether a pat frisk is justified, the question is whether, under the totality of the circumstances, a reasonably prudent person would be warranted in believing the suspect might be armed and dangerous. Terry v. Ohio, 392 U.S. 1, 27 (1968).

“While the officer need not be absolutely certain that the individual is armed, the basis for his acts must lie in a reasonable belief that his safety or that of others is at stake.” Commonwealth v. Silva, 366 Mass. 402, 406 (1974). In a swiftly developing investigation, as present in this case, it was reasonable for Officer Collins to pat frisk the defendant for his own safety. Commonwealth v. Johnson, 454 Mass. 159, 163-164 (2009).

At the time of the search, the defendant was not under arrest, and Officer Collins had not yet learned of the housebreak at 24 Downing Drive. For safety purposes, Collins was certainly justified in ordering the defendant to remove the back pack and place it on the ground, etc. The *search* of the backpack presents a different question, though. Under both the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights, a lawful arrest requires that the arrest be made upon probable cause. The Commonwealth bears the burden of demonstrating the existence of probable cause. Commonwealth v. Borges, 395 Mass. 788, 790-91 (1985). At the time of the search, the defendant was detained upon specific articulable facts that he might be responsible for a housebreak, which was borne out by further investigation. He was not, however, yet under arrest. The backpack search, then cannot be justified as a search incident to arrest, nor was it valid as part of a frisk for weapons since Collins was unaware of specific facts that would warrant a reasonable person to believe he was in danger. Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 (1997). The search yielded some incriminating items, but evidence uncovered during a search of an individual cannot be used to justify the search itself. Commonwealth v. Wedderburn, 36 Mass. App. Ct. 558, 563 (1994). (“[A] search is not to be made legal by what it turns up,” United States v. Di Re, 332 U.S. 581, 595 (1948)).

Accordingly, the Defendant’s Motion to Suppress is **ALLOWED**.



Thomas L. Finigan
Associate Justice

Dated: December 29, 2014

Exhibit 3

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

DISTRICT COURT DEPT.
TAUNTON DIVISION
1431CR1743

COMMONWEALTH

V.

KEVIN A. MAURICIO

DECISION ON DEFENDANT'S SECOND MOTION TO SUPPRESS

This matter came before the Court on April 28, 2015; the Court previously conducted an evidentiary hearing on December 15, 2014 on the defendant's first Motion to Suppress, seeking to suppress the contents of a backpack seized in Taunton on May 28, 2014. The defendant now seeks to suppress the images found on a camera contained in the backpack. The Commonwealth presented the testimony of Detectives Dora Tracy and Michael Bonefant of the Taunton Police Department. For the reasons set forth below, the defendant's motion is DENIED.

FINDINGS OF FACT

The findings of fact from the Court's decision dated December 29, 2014 are incorporated herein, together with the following additional facts based on credible evidence presented at the hearing: following the defendant's arrest, Detective Dora Tracy of the Taunton Police Department was tasked with logging the items contained in the backpack into the Taunton Police Department computer before placing the items into the evidence room. Tracy, a longtime police officer, had been assigned as the Department's evidence officer for a period of approximate 2 ½ years. Based on her discussions with the arresting officers, Detective Tracy believed the items

contained in the backpack, which included jewelry, foreign money and a digital camera, were stolen. In an effort to attempt to locate the true owner of the camera, Detective Tracy powered on the digital camera and examined images stored in the camera in hopes of seeing a face she would be able to identify. The camera had a SIM card for image storage, but was not otherwise equipped to connect to the internet or a remote server, etc. Tracy was unable to determine the true owner of the camera by inspection of the images, but she did notice a photograph of a man with firearms. Tracy knew that a fellow detective, Detective Michael Bonefant, had been investigating a recent theft of firearms in the city of Taunton. Tracy traveled from her basement office upstairs to where she found Detective Bonefant and showed him the image of the man with the firearms.

Detective Bonefant had in fact been investigating a recent housebreak on Plain Street in Taunton, where two firearms, jewelry and other items had been taken. Bonefant had a description of the firearms, and believed that the firearms shown in the image matched the stolen weapons. Bonefant contacted the homeowner, one Brian Silva, and showed him a photo of the firearms. Based on the image of the firearms, together with other items in the photo which Silva recognized as stolen from his home, including fireworks, knives and ammunition, Silva identified the firearms as the pair taken during the break. The defendant was identified as the individual shown in the photograph. Neither Detective Tracy nor Detective Bonefant were able to identify the true owner of the camera, which may or may not have been owned by the defendant.


RULINGS OF LAW

Article 14 of the Massachusetts Bill of Rights and the Fourth Amendment to the U.S. Constitution prohibit warrantless searches absent exigent circumstances. As a general rule, searches and seizures conducted outside of the scope of valid warrants are presumed to be invalid. Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974). When a warrantless search is conducted, the burden is on the Commonwealth to show the search and any resulting seizure falls within the narrow class of permissible exceptions. Id. Commonwealth v. Forde, 367 Mass. 798, 805 (1975).

Assuming without deciding that the United States Supreme Court's decision in Riley v. California, 134 S.Ct. 2473 (2014) extends to digital cameras, Riley is inapplicable in this case. If police are lawfully in a position from which they can observe contraband whose incriminating nature is readily apparent, it may be seized without a warrant. Commonwealth v. Santana, 420 Mass. 205, 211 (1995). *See* Commonwealth v. Ringgard, 71 Mass. App. Ct. 197, 202-203 (2008) (justifiable emergency entry leading to the discovery of firearm in plain view does not transform entry into criminal investigatory search.) Here, Detective Tracy examined the photos contained on the phone in an effort to identify the true owner of the phone. Her efforts were not to uncover evidence, and indeed, she knew little of the details of the crime for which the defendant had been arrested. Similarly, an officer conducting a routine inventory of a prisoner's property incident to arrest may seize any facially incriminating evidence or contraband that comes into plain view. Commonwealth v. Vuthy Seng, 436 Mass. 537, 551 & n. 13 (2002). Likewise, an officer who encounters incriminating evidence or contraband while performing an administrative inspection may seize it without a warrant. Commonwealth v. Accaputo, 380 Mass. 435, 448 (1980). In this case, it would be impractical to require detective Tracy to seek a warrant before examining the camera, when her sole objective was to identify its true owner (and

asking the defendant whether he actually owned the phone was pointless, as a thief would be expected to claim ownership regardless).

Accordingly, the Defendant's Motion to Suppress the evidence seized from the camera is DENIED.



Thomas L. Finigan
Associate Justice

Dated: April 30, 2015

CERTIFICATE OF SERVICE

I, Mathew Zindroski, hereby do certify that I have served the Defendant/Appellant's Application for Direct Appellate Review and Memorandum of Law in Support Thereof on the Commonwealth by delivering a copy to opposing counsel of record by first class mail, postage prepaid, at:

David B. Mark
Office of the District Attorney/Bristol
888 Purchase Street
New Bedford, MA 02740

Signed under the pains and penalties of Perjury on this 2nd day of December 2016.

/s/ Mathew Zindroski

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